

**FILED**  
OCT 30 2009  
By PATRICK E. DUFFY, CLERK  
DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

ROLAND TIREY,	)	CV 09-146-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
SANDRA FAIRBANK, et al.,	)	
	)	
Defendants.	)	

Plaintiff Tirey is a state prisoner proceeding pro se. He filed an action pursuant to 42 U.S.C. § 1983. United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendation in this matter on October 1, 2009. Judge Lynch recommended dismissing Tirey's complaint for failure to state a claim upon which relief may be granted and denying his motion for leave to proceed in forma pauperis. Plaintiff timely objected , and, therefore, he is entitled to de novo review

of those portions of the Findings and Recommendation to which he objected. 28 U.S.C. § 636(b)(1). The portions of the Findings and Recommendation not specifically objected to will be reviewed for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981).

In November 2008, Tirey was released from state custody to begin serving the suspended portion of a sentence. According to Tirey, he and his probation officer immediately developed a very contentious relationship, and he believed she was harassing him and treating him unfairly. On December 3, 2008, the probation officer arrested Tirey, and his probation was subsequently revoked. Tirey was sentenced to 25 years with 7 years suspended. He is currently serving this sentence. His 1983 claims arise from the actions of his probation officer.

Judge Lynch found that Tirey's claims are barred by the Heck doctrine. In Heck, the United States Supreme Court held that:

[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). In other words, as long as Tirey's revocation and sentence stand, he has no legal basis to challenge that

actions that led to the revocation. Only if the revocation is set aside may he raise these claims. As Judge Lynch points out, a habeas proceeding, not a § 1983 claim, is the proper method for challenging the fact of one's confinement. See Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

Tirey objects to Judge Lynch's findings. He argues he "is not trying to get his probation revocation overturn [sic] or asking for a writ of habeas corpus." Pl.'s Obj. at 2. He then offers a lengthy argument on the merits of his claims and how his rights were violated in various ways. Tirey has not addressed Judge Lynch's finding that his claims are barred under Heck. He concedes he does not wish to file a habeas petition, nor does he want to overturn the probation revocation. As Judge Lynch correctly found, unless the revocation is overturned or set aside, Heck bars this Court from addressing the merits of his claims. Therefore, the Court agrees with Judge Lynch that Tirey's complaint must be dismissed under Heck. I find no clear error in Judge Lynch's remaining findings and recommendations. Accordingly,

IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendation (dkt #4) are adopted in full. Tirey's Complaint (dkt #2) is DISMISSED WITHOUT PREJUDICE.

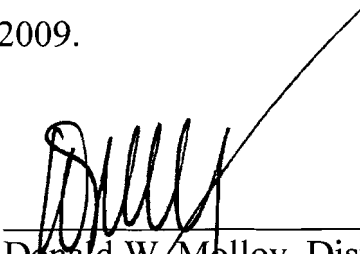
IT IS FURTHER ORDERED that Tirey's motion for leave to proceed in

forma pauperis (dkt #1) is DENIED.

The Clerk of Court is directed to close this matter and to enter judgment pursuant to Fed. R. Civ. P. 58.

The Clerk of Court is further directed to provide Tirey with the form for filing a habeas petition and a motion to proceed in forma pauperis.

Dated this 30<sup>th</sup> day of October, 2009.



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Donald W. Molloy, District Judge  
United States District Court

